Supreme Court, U.S.
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No. 93-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY & CO. INCORPORATED, GOLDMAN, SACHS & CO., ERNST & YOUNG, SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INS. CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation of powers doctrine and Article III and the Fifth Amendment to the United States Constitution.

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OCTOBER TERM, 1993

No. 93-609

FIRST REPUBLICBANK CORPORATION, IFRB CORPORATION, MORGAN STANLEY & CO. INCORPORATED, GOLDMAN, SACHS & CO., ERNST & YOUNG, SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INS. CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 997 F.2d 39. *See* Appendix to Petition for a Writ of Certiorari ("Pet. App.") at A-1 to A-35. The opinion of the United States District Court for the Northern District of Texas is reported at 806 F. Supp. 108 and appears at Pet. App. B-1 to 15.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1] The judgment of the Court of Appeals was entered on July 20, 1993. The Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit was filed October 18, 1993, and certiorari was granted on January 10, 1994.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Article III and the Fifth Amendment to the United States Constitution. *See* Appendix A hereto.

Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1991), codified as Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. III 1991) (''Section 27A''), provides in pertinent part:

> (b) Effect on dismissed causes of action.
>
> Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991,—
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

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1. Petitioners incorporate by reference the Rule 29.1 statement set forth in the Petition for Certiorari. The caption includes all parties to the case below.

> shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

STATEMENT OF THE CASE

Initial Proceedings

On March 1, 1991, Pacific Mutual Life Insurance Company (''Plaintiff'' or ''Pacific Mutual''), commenced this action alleging claims based on Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder, and common law fraud. The complaint arose out of Plaintiff's purchases in July and August 1987, on the open market, of debt instruments issued by Interfirst Corporation in 1986. Plaintiff claimed that Defendants Morgan Stanley & Co. Incorporated, Goldman, Sachs & Co., Salomon Brothers Inc and Ernst & Young (collectively, ''Defendants'' or ''Petitioners''), were liable to Plaintiff because of their alleged involvement in the 1987 merger of Interfirst and RepublicBank Corporation.

On June 20, 1991, this Court announced two decisions that together disposed of Pacific Mutual's Section 10(b) claim. In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), this Court disapproved of the practice of borrowing state limitations periods in Section 10(b) cases and applied a uniform federal limitations period of one year from discovery of the facts constituting the alleged violation and, in any event, not later than three years after such alleged violation. *Id.* at 2782. This Court applied this limitations period to the claims of the plaintiffs in *Lampf* and dismissed their claim as untimely. On the same day, in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), this Court held that a principle of law that is applied retroactively to the parties in the case before the Court must also be applied to all similarly situated parties in all other pending proceedings where such application

is not barred by procedural requirements or final judgments. *See Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510, 2517 (1993).

Applying the holdings of this Court in *Lampf* and *Beam*, in a Memorandum Opinion and Order dated August 15, 1991, the District Court (Sanders, C.J.) dismissed with prejudice Pacific Mutual's Section 10(b) claim as time-barred and dismissed without prejudice its pendent state law claims. On August 16, 1991, the District Court's Order was entered as a final judgment pursuant to Fed. R. Civ. P. 58 and 79(a). Respondent did not appeal from that Order and the time for an appeal expired.

Enactment of Section 27A

In reaction to *Lampf* and *Beam*, proposals to replace the "one-year/three-year" limitations period with a longer statute of limitations were quickly introduced in Congress, but no such legislation was passed.[2] Instead, a political compromise was reached to undo the retroactive effect of *Lampf*. The new statute, addressing only cases pending at the time *Lampf* was decided, was enacted into law on December 19, 1991, four months after the dismissal of plaintiff's action. That law, codified as Section 27A of the Exchange Act, directs the courts to disregard *Lampf* in any private civil action commenced on or before June 19, 1991 (the day before the rulings in *Lampf* and *Beam* were announced). The law also mandates that limitations rules pre-dating *Lampf* be applied even to those actions, such as

2 Two such proposals would have replaced the *Lampf* statute of limitations with longer limitations periods. *See* 137 Cong. Rec. S10,675-76, S10,691-92 (daily ed. July 23, 1991) (statements of Sen. Bryan and Sen. Riegle) (2-and-5-year period); *id.* at H6316 (daily ed. Aug. 1, 1991) (3-and-5-year period). Neither reached the Senate or House floors.

this case, that had previously been dismissed by a final judgment no longer subject to appeal.

The legislative history is replete with complaints by the sponsors of § 27A that this Court's ruling in *Lampf* was "ill-considered"[3] and a "mistake," as well as alarming predictions that retroactive application of *Lampf* would allow notorious miscreants to escape liability.[4] Section 27A therefore was intended to accomplish a "legal reachback"[5] that would eliminate the retroactive effect of *Lampf*, and direct courts to apply a pre-existing rule of decision even in closed cases.

Section 27A has no effect on the statute of limitations to be applied in future cases, or in cases that were filed after *Lampf* but before § 27A was enacted; for those cases, *Lampf* still applies. As Senator Domenici explained, "we resolved [that] issue by *not* extending the statute of limitations on 10(b) type of litigation." 137 Cong. Rec. S17,309 (daily ed. Nov. 21, 1991) (statement of Sen. Domenici) (emphasis added).

However, Section 27A(b) directs the federal courts to reinstate any action brought under Section 10(b) on or before June 19, 1991, and dismissed on limitations grounds after June 19, 1991, if (i) the plaintiff files a motion to reinstate the action within sixty (60) days from the effective date of the statute and (ii) the court determines, without reference to this Court's holdings in *Lampf* and *Beam*, that under the law existing as of June 19, 1991, the action would not have been time-barred.[6] By

3 137 Cong. Rec. H11,812 (daily ed. Nov. 26, 1991) (statement of Rep. Markey).

4 137 Cong. Rec. S18,624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan).

5 137 Cong. Rec. S17,306 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle).

6 In theory, if any federal court should determine that the law of its jurisdiction on June 19, 1991 was that announced by this Court in *Lampf* and *Beam*, it would be required to deny reinstatement. The court would be

enacting Section 27A(b), Congress legislatively reversed *Beam* as it applied to *Lampf* and directed each lower court to apply "its own" pre-*Lampf* law.

The Decisions Below

On January 31, 1992, more than six months after the final dismissal of its action, Plaintiff filed a motion to reinstate its case pursuant to Section 27A(b). In an Opinion dated July 13, 1992, the District Court denied the motion to reinstate, holding that Section 27A(b) is unconstitutional for several of the same reasons later advanced by the Sixth and Tenth Circuits in *Plaut* v. *Spendthrift Farms, Inc.*, 1 F.3d 1487 (6th Cir. 1993), and *Johnston* v. *Cigna Corp.*, 1993 WL 500842, at *9 (10th Cir. Dec. 7, 1993).

The District Court found that Section 27A(b) "violates established separation of powers principles," 806 F. Supp. at 112; Pet. App. at B-6, and that a "small encroachment on the judicial function threatens to unravel the constitutional design, even if in an incremental fashion." *Id.* at 113; Pet. App. at B-10.

The District Court held further that Section 27A(b) had nullified "the judgment entered in this case, and the constitutionally protected rights which had vested in Defendants." *Id.* at 112; Pet. App. at B-7. The District Court relied on a long line of precedents including *Hodges* v. *Snyder*, 261 U.S. 600, 603 (1923), and *McCullough* v. *Virginia*, 172 U.S. 102 (1898).

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barred, however, from looking to those decisions for guidance. Accordingly, the effect, if not the intent, of Section 27A(b) was to eliminate *Lampf* and *Beam* as precedent for dismissed Section 10(b) actions, not necessarily to achieve the reinstatement of those actions.

On July 20, 1993, the Fifth Circuit reversed the District Court's order and found Section 27A(b) constitutional. While the court acknowledged that "[e]ach of the defendants in these cases . . . possessed final, nonappealable judgments dismissing the plaintiffs' § 10(b) claims" (997 F.2d at 46; Pet. App. at A-14), the court held that "judgments that are final and nonappealable do not create rights that are absolutely immune from congressional manipulation." *Id.* at 49; Pet. App. at A-21. The Court recognized that *McCullough* v. *Virginia* stood in the way of any such holding but simply refused to follow that authority, opining that this Court has supposedly "never applied . . . *McCullough* to decide another case" (*id.* at 46; Pet. App. at A-15) and has thus "retreated" from *McCullough*, *sub silentio*. *Id.* at 47; Pet. App. at A-17.[7]

The Fifth Circuit declined to "state general rules as to when the Due Process Clause permits Congress to disturb judgments." *Id.* at 49; Pet. App. at A-21. However, the court went on to hold that a private party's rights in a judgment may be nullified simply by showing that the legislature acted rationally toward the party asserting a due process violation. *Id.* at 50; Pet. App. at A-23.

In a very short section of its opinion, the court brushed aside the contention that Section 27A(b) violates the separation of powers doctrine. While the Fifth Circuit explicitly recognized that legislation reversing the results in particular controversies between private individuals is "violative of our authority to decide cases," *id.* at 54; Pet. App. at A-32, it nevertheless decided that Section 27A(b) "is innocent on this score" because it "leaves the final resolution of securities fraud

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7. For this proposition, the court cited *Fleming* v. *Rhodes*, 331 U.S. 100 (1947) and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

disputes to the courts — we will decide . . . which controversies will end in dismissal despite Section 27A(b).'' *Id.*

Accordingly, the Fifth Circuit concluded that Section 27A(b) was ''harmless'' under separation of powers analysis because ''[b]y upsetting final judgments, Section 27A(b) at most denies us some authority to say when a controversy is over. There is no constitutional impediment to this denial if we share authority with Congress to say when a controversy is done.'' In short, the court held that Congress could reverse a final judgment in order to give the plaintiff another day in court. *Id.* at 54; Pet. App. at A-32. In support of this novel proposition, the court relied on *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980), neither of which involved a legislative attempt to overturn a final judgment between private parties. Strikingly, the Fifth Circuit did not mention, much less distinguish, this Court's landmark decision in *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

The Decisions of the Other Lower Courts

The Fifth Circuit's decision was the first Court of Appeals opinion squarely deciding the constitutionality of Section 27A(b) as applied to final judgments.[8] All three of the circuits that have subsequently addressed the issue have disagreed with *Pacific Mutual* — the Sixth and Tenth Circuits in holdings and the Second Circuit in dictum.[9]

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8. A number of circuits have decided that Section 27A(a), which applies to pending cases, does not violate the Constitution. *See, e.g., Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993) (collecting cases).

9. *See Johnston*, 1993 WL at 500842; *Plaut*, 1 F.3d at 1487; *Axel Johnson Inc.*, 6 F.3d at 83 (finding defendant had no final judgment, but reaffirming the ''constitutional bar to the legislative nullification of a judgment'').

Prior to the Fifth Circuit's opinion, one Circuit had questioned the constitutionality of this legislative nullification of final judgments.[10] Similarly, the majority of district courts that have considered the constitutionality of Section 27A(b) as applied to final judgments have also found it to be unconstitutional,[11] as have a number of academic commentators.[12]

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10. *Cooperativa de Ahorro y Credito Aquada* v. *Kidder, Peabody & Co.*, 993 F.2d 269, 273 n.11 (1st Cir. 1993), *cert. pet. filed*, 62 U.S.L.W. 3299 (Oct. 12, 1993) (rejecting constitutional challenge to Section 27A(b) because no final judgment had been entered, but recognizing that ''a final, unreviewable judgment'' is a property right) (citing *Hammond* v. *United States*, 786 F.2d 8, 12 (1st Cir. 1986)).

11. *See Armijo* v. *E.F. Hutton & Co.*, No. Civ. 90-1064 JC, slip op. at 4-5 (D.N.M. Aug. 17, 1992) (holding § 27A(b) unconstitutional); *Dulude* v. *CIGNA Sec. Corp.*, 1992 WL 281411, at *2 (E.D. Mich. May 15, 1992) (same); *Treiber* v. *Katz*, 796 F. Supp. 1054, 1059 (E.D. Mich. 1992) (same); *Johnston* v. *Cigna Corp.*, 789 F. Supp. 1098, 1100 (D. Colo. 1992) (same), *aff'd*, 1993 WL 500842, at *9 (10th Cir. Dec. 7, 1993); *Plaut* v. *Spendthrift Farms, Inc.*, 789 F. Supp. 231 (E.D. Ky. 1992), *aff'd*, 1 F.3d 1487 (6th Cir. 1993); *see also In re Rospatch Sec. Litig.*, 802 F. Supp. 110, 114 (W.D. Mich. 1992) (dictum); *but see Brown* v. *The Hutton Group*, 795 F. Supp. 1307, 1315-17 (S.D.N.Y. 1992) (holding § 27A(b) constitutional before the Second Circuit's opinion in *Axel Johnson* and questioned in *Rabin* v. *Fivzar Assoc.*, 801 F. Supp. 1045, 1056 n.11 (S.D.N.Y. 1992)); *Casserly* v. *Shearson Lehman Hutton, Inc.*, Civ. No. 4-90-125, slip op. at 5-9 (D. Minn. July 2, 1992).

12. Fisch, *As Time Goes By: New Questions About the Statute of Limitations For Rule 10b-5*, 61 Fordham L. Rev. S 101, S 119 n.121 (1993) (stating that Section 27A(b) ''interferes with the defendant's vested rights''); Palm, *The Constitutionality of Section 27A of the Securities Exchange Act: Is Congress Rubbing* Lampf *The Wrong Way?* 37 Villanova L. Rev. 1213, 1290-91 (1992) (same); Note, *When the Supreme Court Shuts its Doors, May Congress Reopen Them?: Separation of Powers Challenges to § 27A of the Securities Exchange Act*, 34 B.C.L. Rev. 853, 895 (1993) (same); Note, *Section 27A of the SEA: An Unplugged* Lampf *Sheds no Constitutional Light*, 78 Minn. L. Rev. 197, 223 (1993) (Section 27A(b) ''impinges on the structural requirement of separated powers and compromises heightened due process rights'').

SUMMARY OF ARGUMENT

For more than 200 years, it has been settled law that Congress may not strip a private litigant of the vested right to a final judgment rendered by a court of the United States. This principle is based on the separation of powers and due process doctrines that are as old as the Republic itself.

The Fifth Circuit Court of Appeals has now breached this founding principle, brushing aside binding precedent of this Court as well as numerous decisions of other federal tribunals, and held that Section 27A(b) may resurrect a claim that had been finally dismissed and as to which the time to appeal had expired.

The Sixth and Tenth Circuit Courts of Appeals reached the opposite result on the same statute. Analyzing the same issue and the same cases, those courts explicitly rejected the holding of the Fifth Circuit and determined that Section 27A(b) is "an unconstitutional usurpation of the judiciary power." *Plaut* v. *Spendthrift Farms, Inc.*, 1 F.3d 1487, 1499 (6th Cir. 1993); *see Johnston* v. *Cigna Corp.*, 1993 WL 500842, at *9 (10th Cir. Dec. 7, 1993) (the bar against retroactive legislative nullification of final judgments "remains as alive today as it was when our nation was founded"). We submit that the Sixth and Tenth Circuits are correct and that Section 27A(b) is a dangerous and impermissible attempt by the legislature to undermine the essential function of the courts.

ARGUMENT

I. SECTION 27A(b) VIOLATES THE PRINCIPLE IN *HAYBURN'S CASE* AND THE SEPARATION OF POWERS DOCTRINE.

The principle that the legislature may not modify or reverse the final judgment of an Article III court derives from the command of Article III that "the judicial Power of the United States, shall be vested" in the courts, Art. III, § 1, and not in the legislature "in whom no judicial power of any kind appears to be vested . . . ." *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 413 n.2 (1792). "Since 1792, the federal courts have emphasized finality of judgments as an essential attribute of judicial power."[13] The enactment of Section 27A(b) transgresses not only the precedents of this Court but also the principles of our constitutional system. Because the judiciary consistently rejects such infringements, the Tenth Circuit observed that, other than the Fifth Circuit's opinion below, "we cannot locate a single case where a court has upheld an attempt by Congress to upset a final, nonappealable judgment in a case between private parties." *Johnston*, 1993 WL 500842, at *9; *see Plaut*, 1 F.3d at 1493.

The Constitution "mandates" that each branch of government remain "entirely free from the control or coercive influence, direct or indirect, of either of the others . . . ." *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (quoting *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629 (1935)). Even in situations where "no immediate threat to liberty is apparent," it remains "one of the most vital functions

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13 The Constitution of the United States of America: Analysis and Interpretation 633 (Cong. Research Serv., Killian and Beck Eds. 1987).

of this Court to police with care the separation of the governing powers." *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring).

The infringement of separation of powers that Section 27A(b) represents — the overreaching of the legislature — was of particular concern to those who debated and created the Constitution. In particular, "the debates of the Constitutional Convention and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley* v. *Valeo*, 424 U.S. 1, 129 & n.166 (1976). Because "the legislative authority, necessarily, predominates," *The Federalist* No. 51, at 350 (J. Cooke ed. 1961) (Madison), it was "the profound conviction of the Framers" that legislative power was "to be most carefully circumscribed." *INS* v. *Chadha*, 462 U.S. 919, 947 (1983).[14]

Therefore, Alexander Hamilton, among others, stressed that "all possible care is requisite" to enable the judiciary, "the least dangerous" branch, to "defend itself against [legislative] attacks." *The Federalist* No. 78, at 522-23 (Hamilton). *See Bowsher* v. *Synar*, 478 U.S. 714, 725 (1986). "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control for *the judge* would then be *the legislator*." *The Federalist* No. 47, at 329-30 (Madison) (emphasis in original).[15] Accordingly, it is for this

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14. *See also Mistretta*, 488 U.S. at 361 ("[T]he Framers recognized the particular danger of the Legislative Branch's accreting to itself judicial or executive power . . . ."); *Johnston*, 1993 WL 500842, at *8 (quoting *The Federalist* No. 48, at 334 (Madison) (the legislature "can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes.")). For a cogent exposition of the historical background of Article III, see the majority opinion of Judge Batchelder in *Plaut*, 1 F.3d at 1490-1492.

15. "A judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from domination by other branches of government." *Northern Pipeline*

Court to insure "that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch' "[16] and to invalidate legislative "inroads into functions that have traditionally been performed by the judiciary." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (Opinion of Brennan, J.).[17]

A. The Separation of Powers Doctrine Bars Legislative Efforts to Vacate Final Judgments.

No one disputes that Section 27A(b) specifically allows the reopening of final decisions of Article III courts. As such, the statute impermissibly intrudes on the judicial Power, a result prohibited by the constitutional framework and this Court's decisions spanning more than 200 years. The invalidation of final judgments by Section 27A(b) strikes at the very heart of the judicial Power, and threatens not only the end product of the judicial process — final judgments — but, by implication, all of the subsidiary functions and decisions of the Judiciary.

Over a century ago, the Supreme Judicial Court of Massachusetts noted the historical antecedents for the barrier

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Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (Opinion of Brennan, J.) (quoting *United States* v. *Will*, 449 U.S. 200, 217-18 (1980)).

16. *Mistretta*, 488 U.S. at 383 (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 851 (1986)).

17. To "forestall the danger of encroachment 'beyond the legislative sphere,' " this Court has "not hesitated to invalidate provisions of law that violate this principle." *Metropolitan Washington Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2310-11 (1991) (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928), and *Morrison* v. *Olson*, 487 U.S. 654, 693 (1988)); *Buckley*, 424 U.S. at 121 (separation of powers a "vital check against tyranny").

between legislation and final judgments:

> Lord Coke calls judgment and execution the "fruit of the law." To vest in the legislature the power to take them away, or to impair their effect on the rights of parties, would be to deprive the judiciary of its most essential prerogative. It could then no longer finally adjudicate and determine the rights of litigants. The will of the legislature would be substituted in the place of fixed rules and established principles, by which alone judicial tribunals can be governed. . . . Indeed it is difficult to see how the legislature could more palpably invade the judicial department and effectually usurp its functions.[18]

Denny v. *Mattoon*, 2 Allen (Mass.) 361, 379 (1861).

In the end, the wealth of constitutional history establishes that one of the purposes of Article III was to proscribe legislative efforts to undermine final judgments. The Constitutional Convention was presented with, but did not adopt, a proposal from Charles Pinckney of South Carolina that would have permitted legislative revision of court decisions by establishing the Congress as the "last Resort on Appeal in Disputes between two or more States." 1 M. Jensen, The Documentary History of the Ratification of the Constitution 246-47 (1976). This proposal was rejected. Contemporary commentators emphasized the value of judicial finality: "[T]he federal judiciary should

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18. The "power of 'finality of decision' " is one of the "inherent" attributes of judicial power: "when a court of the United States is entrusted with the determination of any question *whether* of law or of fact, its decision of such question cannot constitutionally be made reviewable except by a higher *court*, that is, cannot be made reviewable by either of the other two departments." H. Chace & C. Ducat, Corwin's The Constitution and What it Means Today 204-05 (14th ed. 1978) (citing *Hayburn's Case*) (emphasis in original).

have power co-extensive with the federal legislature — that is the power of deciding *finally* on the laws of the union." Lee, *Letters of a Federal Farmer* (Oct. 1787) in Pamphlets on the Const. of the United States 279, 306-07 (P. Ford ed. 1968) (emphasis added).[19] Indeed, James Madison specifically criticized the practice of Pennsylvania's legislature in which "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination." *The Federalist* No. 48, at 337 (Madison). As Alexander Hamilton wrote: "A legislature without exceeding its province cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases." *The Federalist* No. 81, at 545 (Hamilton).[20]

The federal courts first applied this principle and "enforced" Article III in *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792). In that case, the Justices of the Supreme Court, sitting as circuit judges, addressed a statute that granted the federal courts the initial authority to determine the eligibility and amount of pensions for Revolutionary War veterans. The opinions of the Justices of the Court stated that the statute was unconstitutional because it permitted the Secretary of War to review the decisions of the courts and to transmit his opinion to Congress for

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19. In the same vein, the Constitutional Convention rejected a motion requiring that "the Judicial power shall be exercised in such manner as the Legislature shall direct." 1 J. Goebel, History of the Supreme Court of the United States 243 n.228 (1971) (quoting 2 M. Farrand, Records of the Federal Convention of 1787 431 (1911)). As one commentator has noted, "[a] clearer rejection of congressional authority over judicial power is hard to imagine." Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest For the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 791 (1984).

20. *See also id.* at 121 ("[T]here is a [great] absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge").

its approval. In ruling that this process violated the separation of powers principle, Justice Iredell wrote: "No decision of any court of the United States can under any circumstances in our opinion agreeable to the Constitution be liable to a revision or even suspension by the Legislature itself, in whom no judicial power of any kind appears to be vested . . . ." *Id.* at 413 n.2. Chief Justice Jay and Justice Cushing added that the legislature cannot "sit as a court of errors." *Id.* at 410 n.2.[21]

This absolute mandate "remains as alive today as it was when our nation was founded" (*Johnston*, 1993 WL 500842, at *10) and, in its light, Section 27A(b) cannot survive. This Court has consistently adhered to the principle stated in *Hayburn's Case* (*see Morrison* v. *Olson*, 487 U.S. 654, 677 n.15 (1988)), and each such reaffirmation directly mandates the invalidation of Section 27A(b).

While *Hayburn's Case* and its progeny are generally used to strike down statutes that provide for potential legislative or executive review of the future judgments of a tribunal, Section

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21. In footnote 2 to the dismissal on mootness grounds in *Hayburn's Case*, the justices and district judges sitting on the New York, Pennsylvania and North Carolina circuit court panels stated their views on separation of power principles. Those judges considered the law unconstitutional because of the "primary principle of the utmost importance that no decision of the Judiciary Department should under any pretext be brought in revision before either the Legislative or Executive Departments of government." 1 C. Warren, The Supreme Court in United States History 72 (Rev. ed. 1937) (quoting American Daily Advertiser (April 16, 1792)). *See also* J. Nowak & R. Rotunda, Constitutional Law 71 (4th ed. 1991); Bloch, *The Early Role of the Attorney General In Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561, 592-93 (1989); D. Currie, The Constitution in the Supreme Court 311, n.173 (1984); C. Wright, The Law of Federal Courts 57-58 (4th ed. 1983); Spann, *Expository Justice*, 131 U. Pa. L. Rev. 585, 610 n.94 (1983) (*Hayburn's Case* prohibits the judiciary from taking actions "subject to revision by the executive").

27A(b) represents an even greater intrusion on the role and right of the judiciary. Unlike the legislation in *Hayburn's Case*, which merely *permitted* executive review of court pension decisions, Section 27A(b) *mandates* the automatic resuscitation of final judgments in a class of cases singled out by Congress, upon application by the interested party.

As early as 1851, this Court reaffirmed *Hayburn's Case* and its core holding: that "when the [judicial] decision was subject to the revision of a Secretary and of Congress, [it] could not be executed by the court as a judicial power." *United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 50 (1851) (involving an award of damages claimed under treaty, subject to discretionary payment by the executive branch). Similarly, in *Gordon* v. *United States*, 117 U.S. 697, 703 (decided 1864, Opinion printed in Appendix 1885), this Court followed the principle that final judgments are not subject to legislative or executive revision, noting that this tenet "was decided by the Court as long ago as 1792 in *Hayburn's Case* . . . and the decision has ever since been regarded as a constitutional law." *Id.* at 703. This was also the holding of *United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874), where the Court stated again: "[I]t is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of . . . any other department of the government." *Id.* (citing *Gordon*).

In the decade between 1890 and the turn of the century, this Court upheld the principles of *Hayburn's Case* and *Gordon* on several occasions. In *United States* v. *Waters*, 133 U.S. 208, 213 (1890), this Court ruled that a judicial award of payment to a district attorney could not be "subject to the re-examination and reversal of the Attorney General." *Id.* (citing *Hayburn's Case*). Three years later, in *In re Sanborn*, 148 U.S. 222, 224 (1893), and *Interstate Commerce Comm'n* v. *Brimson*, 154 U.S. 447, 484 (1894), this Court restated the rule that judgments subject to extra-judicial revision are inconsistent with the judicial Power. *See also La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 456-57 (1899) (adhering to *Gordon* but

finding no violation of Article III because judgment provided for final determination not subject to further review).

In *District of Columbia* v. *Eslin*, 183 U.S. 62, 65 (1901), this Court applied *Gordon* in holding that a decision that could only be enforced if the "Congress should at some future time sanction it," would not be "the exercise of judicial power." *Id.* at 65-66.[22] Accordingly, in *Williams* v. *United States*, 289 U.S. 553, 564 (1933), this Court noted that *Gordon* forbids a court from expressing an opinion where "its judgment would not be final and conclusive" — a rule that had met with "uniform approval." *Id.* at 564. And in *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400-01 & n.29 (1934), this Court confirmed that the courts may not "give or review judgments" that are "conditioned" on the revisory power of an agency.

The long line of decisions was extended in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113-14 (1948), in which this Court relied on *Hayburn's Case* in denying judicial review of an order of the Civil Aeronautics Board because the governing statute subjected that order to discretionary review by the President. In so deciding, this Court confirmed the principle that "[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." This was also the reasoning in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), which made clear that jurisdictional statutes that "subject the decisions called for from these courts to an extrajudicial revisory authority" are "incompatible with the limitations upon judicial power this Court has drawn from Article III." *Id.* at 582 (citing *Hayburn's Case*).

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22. *See also Muskrat* v. *United States*, 219 U.S. 346, 354 (1911) ("the whole subject of the nature and extent of the judicial power conferred by the Constitution is treated [in *Gordon*] with great learning and fullness").

Although it permitted the reopening of a judgment in favor of the government based on the government's power to waive the *res judicata* effect of a decision in its favor, *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980), did not disturb the line of precedent concerning private parties, dating back to *Hayburn's Case*. Instead, it made clear that, outside of the limited context of judgments in favor of the government, "legislative review of a judicial decision would interfere with the independent functions of the Judiciary." *Sioux Nation*, 448 U.S. at 392 (citing *Hayburn's Case*). *See* p. 24-25, *infra*.

Even more recently, this Court has reaffirmed the principle that legislative or executive "revisory authority over the Court is inconsistent with its exercise of judicial power." *United States* v. *Mitchell*, 463 U.S. 206, 213 n.12 (1983). In *Mistretta*, this Court sustained the constitutionality of the United States Sentencing Commission, but took pains to note that "'neither of [the Branches] ought to possess directly or indirectly, an overruling influence over the others.'" 488 U.S. at 409 (quoting *The Federalist* No. 48, at 332).[23]

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23. In addition to the Section 27A cases (*see* p. 9 n. 11, *supra*), the lower courts have upheld this principle with respect to a variety of other statutes. *See Town of Deerfield, N.Y.* v. *FCC*, 992 F.2d 420, 427-28 (2d Cir. 1993); *Central States, Southeast & Southwest Areas Pension Fund* v. *Lady Baltimore Foods*, 960 F.2d 1339, 1345 (7th Cir. 1992) (if legislation had been enacted after final judgment entered, it may have "invade[d] the judicial power of the United States"), *cert. denied*, 113 S. Ct. 179 (1992); *Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989); *Tonya K. ex rel. Diane K.* v. *Board of Educ.*, 847 F.2d 1243, 1247 (7th Cir. 1988) ("once a court has disposed of a case, Congress may not dictate a different decision"); *Benoni* v. *Boston and Maine Corp.*, 828 F.2d 52, 57-58 (1st Cir. 1987) (following *Hayburn's Case*); *Humana Hosp. Corp., Inc.* v. *Blankenbaker*, 734 F.2d 328, 332-33 (7th Cir. 1984) ("no decision of a federal court may be reviewed by the legislative branch"); *Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974) ("superior legislative review" of judicial decisions is forbidden); *De Rodulfa* v. *United States*, 461 F.2d 1240, 1252 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972); *Adams* v. *Fidelity and Cas. Co. of N.Y.*, 147 F.R.D. 265, 269 (S.D. Fla. 1993); *Craig* v.

B. The Legislature May Not "Share" the Judicial Power To Issue Final Decisions.

As noted earlier, the Fifth Circuit did not even seek to address, let alone distinguish, *Hayburn's Case* and the scores of cases which have applied the constitutional principle that plainly establishes the invalidity of Section 27A(b). Instead, the Fifth Circuit sought to minimize § 27A(b)'s intrusion on the judicial Power as "harmless" because the statute "at most denies us some authority to say when a controversy is over." 997 F.2d at 54; Pet. App. at A-32. Even though Section 27A(b) *requires* the courts to reopen cases, the Fifth Circuit asserted that the statute calls for a mere "shar[ing]" of authority between Congress and the federal courts because the legislation does not direct the results in particular controversies between private individuals; rather it "leaves the final resolution of securities-fraud disputes to the courts." *Id.*

But there is no "sharing" exception to the separation of powers principle. Article III provides in simple, straightforward words that judicial Power is vested in the courts — not part of that power, but all of it. *See Martin* v. *Hunter's Lessee*,

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Ohio Dep't of Admin. Servs., 790 F. Supp. 758, 771 (S.D. Ohio 1992) ("rewrit[ing] of judicial decisions" forbidden by Article III); *United States* v. *Bogle*, 689 F. Supp. 1121, 1147 (S.D. Fla. 1988) ("the constitutional problems of having legislative and executive review of a judicial decision appear obvious"); *United States* v. *Board of Educ. of the City of Chicago*, 588 F. Supp. 132, 235 (N.D. Ill.), *vacated on other grounds*, 744 F.2d 1300 (7th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *Electronic Data Sys. Corp. Iran* v. *Social Sec. Org. of the Government of Iran*, 508 F. Supp. 1350, 1363 (N.D. Tex. 1981) (Congress may not "negate, disregard or nullify the judgment of the Court already rendered"); *Cerro Metal Prods.* v. *Marshall*, 467 F. Supp. 869, 877-78 (E.D. Pa. 1979) (separation of powers bars an act of Congress which pronounces that "what had theretofore been judicially declared as law 'shall be deemed never to have had effect' "), *aff'd*, 620 F.2d 964 (3d Cir. 1980).

14 U.S. (1 Wheat) 304, 330 (1816) ("whole judicial power" must be vested in judiciary); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) (same). The judicial Power "can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress can share with the Judiciary the power to override a Presidential veto." *United States* v. *Nixon*, 418 U.S. 683, 704 (1974). *See also Chadha*, 462 U.S. at 958-59 ("sharing" with the Executive by Congress of authority over aliens is impermissible even if efficiency would be promoted). This Court has never suggested that the judicial Power to render final decisions in particular cases and controversies — the irreducible minimum of the power to decide cases and controversies — may constitutionally be "shared." *See* pp. 13-19, *supra*.

1. The Rule of *The Schooner Peggy* Recognizing the Legislative Power to Affect Pending Cases Does Not Undermine the Protection Accorded Final Judgments.

In reaching its unique ruling approving "shar[ing]" of judicial power, the Fifth Circuit relied primarily upon *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and its progeny,[24] and *Sioux Nation*, 448 U.S. at 371. Turning first to *The Schooner Peggy*, that case only applies to the application of new law in *pending* matters — not in *closed* cases in which a final judgment has been entered. Indeed, most of *The Schooner Peggy* opinion is designed to demonstrate that the 1801 peace treaty with France (which essentially negated the decision of the lower court) became law *prior* to this Court's decision on the appeal. As such, the case stands only for the proposition —

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[24] *E.g.*, *149 Madison Ave. Corp.* v. *Asselta*, 331 U.S. 795, *modifying* 331 U.S. 199 (1947).

irrelevant to this appeal — that an appellate court must ordinarily apply existing law when it considers an appeal. *See Johnston*, 1993 WL 500842, at *9 & n.11 (*The Schooner Peggy* does not support the "Fifth Circuit's sweeping statement"; *The Schooner Peggy* "judgment was not yet final at the time the law changed"). This principle simply does not address, much less call into question, the rule in *Hayburn's Case*:

> Although we agree that the two branches share such authority while a case is still pending, Congress's authority to say when a controversy is over ends when the case's journey through the courts comes to an end. *See Campbell* v. *Holt*, 115 U.S. 620, 628 (1885) (statutes of limitations "have always been held to be within the legislative power *until the bar is complete*").

Johnston, 1993 WL 500842, at *9 & n.11 (emphasis added).

Accordingly, in numerous decisions following *The Schooner Peggy*, this Court has refused to permit extra-judicial revision of truly final judgments. *See* pp. 13-19, *supra*. No court, until the Fifth Circuit decision below, had ever applied *The Schooner Peggy* to avoid this well-settled rule.

While the Congress may change the law that the courts apply to pending cases, and *The Schooner Peggy* generally instructs the courts to "obey" such a change in law provided such a change comes "before the decision of the appellate court," 5 U.S. (1 Cranch) at 110, this principle does not apply to closed cases. Once a judgment becomes final and non-appealable, the case is over and the court divests itself of jurisdiction. Neither the court nor the litigants can be forced to "obey" the reopening of the action by the legislature. Unlike a change in law applicable to pending and future cases, which is inherently "legislative" in nature, the enactment of a statute such as Section 27A(b) for the sole purpose of reopening closed cases between private parties is a judicial — not legislative — function beyond the purview of Congress. *See* p. 27 & n. 30, *infra*.

As such, this Court should reject the notion that legislative power over pending cases legitimizes legislative attempts to reopen closed cases in which the courts have fully, and finally, exercised the judicial Power. This Court has consistently decided that "the authority — and the responsibility — to make an informed final determination" must "remain[ ] with the judge."[25] An erosion of this principle to allow the legislature to reverse final judgments, but "permit" the courts to make another, final resolution, would expose the judiciary and the public to the very same state of affairs that led to the passage of Article III. No judgment would be final — any disappointed litigant with the requisite wit, will, and resources could importune the legislature to "give him one more chance." "Sharing" would become "ceding," in short order.

Additionally, the legislative reopening countenanced by the Fifth Circuit would render a court decision "advisory." Such a result could not be reconciled with "the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." *Chicago & Southern Air Lines*, 333 U.S. at 113-14; *Gordon*, 117 U.S. at 705; *Town of Deerfield, N.Y.* v. *FCC*, 992 F.2d 420, 428 (2d Cir. 1993). *See also Sioux Nation*, 448 U.S. at 391-92. Indeed, if this Court authorizes Congressional reopening and reversal of final judgments, that decision would mean that *all* future judgments of the Article III courts could be reduced to advisory opinions subject to possible legislative revision.[26]

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25. *Northern Pipeline*, 458 U.S. at 81 (opinion of Brennan, J.) (quoting *United States* v. *Raddatz*, 447 U.S. 667, 682 (1980)); *Northern Pipeline*, 458 U.S. at 86 n.38 (opinion of Brennan, J.) (power to issue an award of execution of a judgment is an "essential part" of the judicial power) (quoting *Brimson*, 154 U.S. at 484 (quoting *Gordon*, 117 U.S. at 702)).

26. And such a threat, even if unexercised, intrudes on the separation of powers. *See Metropolitan Washington Airports Auth.*, 111 S. Ct. at 2306 n.13 ("[T]he threat of veto hangs over the Board of Directors like the sword over Damocles, creating a 'here-and-now subservience' to the Board of Review sufficient to raise constitutional questions.").

2. The *Sioux Nation* Decision Permitting Government to Waive the Defense of Res Judicata Is Irrelevant to this Proceeding.

The Fifth Circuit also relied on *Sioux Nation*, 448 U.S. at 371, in attempted support of its holding that "the Constitution does not forbid Congress from mandating that a controversy continues when the Court says that it is done." 997 F.2d at 54; Pet. App. at A-31. *Sioux Nation* does not remotely support this proposition in an action involving private parties.

In *Sioux Nation*, this Court upheld legislation that permitted plaintiffs to assert claims against the United States without regard to prior judgments that the Court of Claims and the Supreme Court had rendered in favor of the Government. The Court held that any separation of powers objections were defeated by the "dispositive" principle that the "Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States." *Id.* at 397 (citing *United States* v. *Cherokee Nation*, 270 U.S. 476, 486 (1926)). This principle rests upon "a distinct and specifically enumerated constitutional power of Congress," *Plaut*, 1 F.3d at 1496, the "constitutional power of Congress to define and 'to pay the Debts . . . of the United States.' " *Sioux Nation*, 448 U.S. at 397 (quoting Art. I, § 8, cl. 1).[27]

However, outside of this limited context, the Court in *Sioux Nation* reaffirmed the rule in *Hayburn's Case* that "legislative

27. *See Johnston* v. *Cigna*, 1993 WL 500842, at *9 n.10 (10th Cir. 1993) (the general rule barring reversal of final judgments does not apply to judgments "entered in the government's favor on a claim against the government"); *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 811 (*Sioux Nation* permits Congress "to waive the preclusive effect of a judgment that the United States is without a certain obligation"); *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1106 n.8 (N.D. Cal. 1992) (same).

review of a judicial decision would interfere with the independent functions of the Judiciary," 448 U.S. at 392, and that "a legislative direction to a court to find a judgment in a certain way would be little more than a judgment rendered directly by Congress." *Id.* at 398 (quoting *Nock* v. *United States*, 2 Ct. Cl. 451, 457-58 (1866)). Justice Rehnquist also noted in his dissent: "as the Court apparently concedes, Congress may not . . . review and set aside a final judgment of an Art. III court, and order the courts to rehear an issue previously decided in a particular case." *Id.* at 429 (Rehnquist, J., dissenting).

C. The Legislature May Not Reopen Final Judgments In Order to Interpose New Law.

Although the Fifth Circuit did not address the issue, both plaintiff and the Government argued below that *Hayburn's Case*, 2 U.S. (2 Dall.) at 408, *O'Grady*, 89 U.S. at 641, and *Chicago & Southern Air Lines*, 333 U.S. at 103, are distinguishable from the instant case because they did not involve the application of "new law" passed by Congress. The passage of new law, it is asserted, is inherently "legislative" and, thus, in enacting Section 27A(b) Congress purportedly did not sit as "court of errors," as *Hayburn's Case* forbids.

While these three cases did not involve the passage of new legislation, their holdings — that another branch of the government could not revise or suspend the final judgment of an Article III Court — did not depend in the slightest on whether "new" law reversed the final judgment in question.[28] Indeed,

28. It should be noted, however, that Thomas Jefferson believed that the most insidious intrusions on the judicial power would be in the guise of *new* legislation: If "the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly in many instances, decided rights which should have been left to judiciary controversy." *United States* v. *Brown*, 381 U.S. 437, 446 n.20 (1965) (quoting Jefferson, Notes on the State of Virginia 157-58 (Ford ed. 1894)).

because the Congress acts primarily through legislation, *Chadha*, 462 U.S. at 945-46, the proper focus must be upon the impact of the legislation on the judiciary. A legislative decision to void a final judgment through new law designed for that purpose is just as violative of Article III, if not more so, as the executive revisions of final judgments using existing legislation in *Hayburn's Case*, *O'Grady* and *Chicago & Southern Air Lines*. Thus, the lower courts have never accepted the proposition that, by enacting "new law," Congress may eviscerate final judgments.[29]

In any event, even if one were to entertain the possibility that "new law" may be interposed to reopen final judgments, Section 27A(b) is not "legislative" in any meaningful sense. This Court has never before been confronted with a statute, such as Section 27A(b), that has *no prospective* effect whatsoever on future cases and only retroactively affects closed and dismissed cases. Stated bluntly, Section 27(A)(b) had only one purpose:

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29. *See Central States Pension Fund*, 960 F.2d at 1345 (passage of new law would have had separation of powers implications if it had been enacted after a final judgment had been entered); *Benoni* v. *Boston and Maine Corp.*, 828 F.2d 52, 57 (1st Cir. 1987) (discussing a private bill intended to resurrect dismissed claims; legislation overturning final judgment would violate "the principle of separation of powers"); *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 810 (separation of powers "protects judicial action from superior legislature review"; mandating narrow construction of new law, 20 U.S.C. § 1415, retroactively divesting court of jurisdiction); *Tonya K.*, 847 F.2d at 1247-48 (separation of powers would be violated if new law, 20 U.S.C. § 1415(e), had been construed as overturning final judgments); *Daylo*, 501 F.2d at 815 ("independence of the judicial branch" would be impaired if new law, 38 U.S.C. § 211(a) and 3111, had been construed to overturn final judgment); *De Rodulfa*, 461 F.2d at 1252 (construing legislation to avoid separation of powers issues, notwithstanding passage of new legislation, 38 U.S.C. § 211(a), on attorneys' fees).

to reverse the retroactive effect of a Supreme Court decision. Because legislation "looks to the future,"[30] Section 27A(b), a statute that affects only closed cases, lacks the fundamental and defining characteristic of legislation.[31]

D. The Separation of Powers Doctrine Does Not Permit the Overturning of a Final Judgment Because It Is Based on Limitations Grounds Or For Any "Equitable" Reason.

In its "due process" or "vested rights" discussion, the Fifth Circuit held that because limitations periods are a matter of "legislative grace," Section 27A(b) does not offend principles of due process because Congress acted "rationally" when it legislatively removed the *Lampf* limitations bar. 997 F.2d at 50; Pet. App. at A-22 (citing *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304, 314-15 (1945)). This principle lacks merit in the due process context (*see* p. 35-40, *infra*), and cannot, in any event, mitigate or justify the intrusion on separation of powers that Section 27A(b) represents.

A judgment is a judgment and this Court has made it clear that interference with such decrees of an Article III court is *per se* impermissible — without inquiry or analysis of the reasons

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30. *See New Orleans Publ. Serv., Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 370-71 (1989) (quoting *Prentis* v. *Atlantic Coast Line, Inc.*, 211 U.S. 210, 226 (1908)); *Koshkonong* v. *Burton*, 104 U.S. (14 Otto) 668, 678-79 (1881) (legislative declaration may, at the "utmost," alter "existing law in its application to future transactions").

31. In addition, retroactive legislation that "prescribe[s] a rule for the decision of a cause in a particular way" without changing the underlying law violates the Constitution. *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). Although the circuit courts that have considered the issue have determined that Section 27A(a) does not violate the rule in *Klein*, they have reaffirmed the protections to which final judgments are entitled under other constitutional doctrines. *See, e.g., Johnston*, 1993 WL 500842, at *2, *5.

behind the judgment. If the Congress may undo a judicial order because it is based on one particular affirmative defense, there is no logical reason why the legislature could not widen its sights to embrace other defenses, or even equitable considerations. If Congress were able to undo judicial action, under the guise of a "balancing test" — particularly one which would emphasize equitable considerations — the possibilities of "remedial" legislation, stimulated by popular pressures, would be endless. But this Court has refused to consider such a corrosive evasion of fundamental principles: "Where a power has been committed to a particular Branch of the Government in the Constitution, the balance already has been struck by the Constitution itself." *Public Citizen*, 491 U.S. at 486 (Kennedy, J., concurring). Thus, because Section 27A(b) violates separation of powers principles, it must be invalidated regardless of any equitable considerations that might be offered to justify the encroachment. *See Bowsher* v. *Synar*, 478 U.S. 714, 736 (1986); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 754 (1982) (considerations relating to "private suit[s] for damages" insufficient to justify intrusion on another branch).

* * *

In upholding Section 27A(b) on the grounds that the courts may "share [the] authority . . . to say when a controversy is done," the Fifth Circuit has violated the fundamental principle that "the Constitution does not contemplate that there shall be more than *one* Supreme Court," *O'Grady*, 89 U.S. (22 Wall.) at 647-48 (emphasis added). The view that the power to issue final judgments may be shared "provides no limiting principle," and thus "threatens to supplant completely our system of adjudication in independent Art. III tribunals." *Northern Pipeline*, 458 U.S. at 73 (Opinion of Brennan, J.). The Fifth Circuit's holding "would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government." *Id.* at 74.

II. SECTION 27A(b) VIOLATES THE FIFTH AMENDMENT.

A. The Fifth Amendment Protects Property Rights Vested In Final Judgments.

By enacting Section 27(A)(b), Congress not only violated Article III, it infringed upon petitioners' vested property rights. The Fifth Amendment also prohibits (or requires just compensation for) legislation which divests a private litigant of a final judgment that is no longer subject to judicial modification.

This principle dates back to *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856), in which this Court accepted as a "general proposition . . . certainly not to be denied" that an "act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby."[32]

Purely private rights, once finally adjudicated, "become[] absolute" and are "beyond the reach of Congress." 59 U.S. (18 How.) at 431. When private rights have "passed into judgment," this Court held, "it is the duty of the Court to enforce it." *Id.*[33] In *The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 463 (1870), this Court observed that "if the remedy [in *Wheeling &*

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32. The Fifth Circuit acknowledged *Wheeling* but simply declined to follow it. 997 F.2d at 46 n.11. In any event, several years before *Wheeling*, this Court explained that "no legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment." *Massengill* v. *Downs*, 48 U.S. (7 How.) 760, 768 (1849).

33. In *Wheeling & Belmont Bridge Co.*, the Court decided that a portion of a judgment based upon the *public* right to river navigation could be altered because Congress had the constitutional power to regulate river navigation. However, the Court upheld the portion of the decree regarding the costs adjudged by a court, holding that such private rights were "unaffected by the subsequent legislation." 59 U.S. (18 How.) at 430.

Belmont Bridge] had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the power of Congress." Similarly, this Court opined in 1884 that "due process of law" excludes from legislative power, *inter alia*, "acts reversing judgments, . . . legislative judgments and decrees." *Hurtado* v. *California*, 110 U.S. 516, 536 (1884).

In view of these authorities, this Court's decision in *McCullough* v. *Virginia*, 172 U.S. 102, 123-24 (1898), which the Fifth Circuit sought to dismiss as an aberration without a past or a future, had a firm precedential basis. In *McCullough*, this Court held that legislation that overturned a taxpayer's final judgment granting him a tax refund from the Commonwealth of Virginia was unconstitutional because:

> It is not within the power of the legislature to take away rights which have once vested by a judgment. Legislation may act on a subsequent proceeding, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.[34]

The Fifth Circuit concluded (or strongly implied) that *McCullough* is no longer good law, in large part, because "the Court has never applied this holding in *McCullough* to decide

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34. The Fifth Circuit maintained that *McCullough* involved a case pending upon appeal, not a final judgment. 997 F.2d at 46; Pet. App. at A-15. However, in both *McCullough*, 172 U.S. at 123-24, and in *Hodges*, 261 U.S. at 603, this Court described *McCullough* as involving a "judgment." And McCullough's case was only "pending" in the sense that he had filed a writ of error to the Supreme Court of Appeals of Virginia. 172 U.S. at 123-24. Under Virginia law, such a petition for writ of error "does not affect the finality of the judgment." *Hirschkop* v. *Commonwealth*, 209 Va. 678, 166 S.E.2d 322, 323-24, *cert. denied*, 396 U.S. 845 (1969) (citing cases).

another case." 997 F.2d at 46; Pet. App. at A-15. To begin with, as the Sixth Circuit held in *Plaut*, "we confess ignorance of the rule implied in the Government's argument that a single, unreversed decision of the Supreme Court is not binding on the District Court or on us . . . . *McCullough* remains good law . . . even if the Supreme Court has not ruled on a similar case since." *Plaut*, 1 F.3d at 1493 n.12. The Second and Tenth Circuits reached the same conclusion. *Johnston*, 1993 WL 500842, at *5 ("the Court has reiterated the vested rights principle underlying *McCullough* on several occasions"); *Axel Johnson*, 6 F.3d at 83.

At any rate, the Fifth Circuit is simply incorrect in its assertion that *McCullough* is a maverick decision, which has been ignored by the courts. Instead, either expressly or implicitly, this Court has on numerous occasions approved the *McCullough* doctrine; in fact, the very next year in *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 478 (1899), this Court reiterated that "it is undoubtedly true that legislatures cannot set aside the judgments of courts."

Similarly, in *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338, 340 (1922), this Court invalidated state legislation that retroactively abolished a claim for tolls unlawfully collected in a case in which the Florida Supreme Court had already ruled in the plaintiff's favor. One year later, in *Hodges* v. *Snyder*, 261 U.S. at 603, this Court specifically reaffirmed *McCullough* and *Wheeling & Belmont Bridge*, stating that "the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." *Id.* This Court upheld the legislative decision to overturn a judgment of the Supreme Court, but only because the legislation merely affected the "public rights involved" and did not impair the private "judgment for costs." *Id.* at 604.

By contrast, in a later case, this Court rejected an attempt to reopen a final decree in a case where private rights were at stake. *See Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*,

284 U.S. 370, 389 (1932) (Commission could not repeal its own award of reparation retroactively; it could repeal the order as it affected future conduct and substitute a new rule of conduct).

In considering legislation analogous to Section 27A(b), in *Stewart* v. *Keyes*, 295 U.S. 403 (1935), this Court refused to permit a plaintiff to reopen the sale and deed of a property that had been ordered by an Oklahoma court in 1916. *Id.* at 416-17. As in this case, the plaintiff contended that supervening legislation had divested the defendants of the benefit of a limitations period. *Id.* at 416. The unanimous Court decided that the legislation could not reopen the "extinguished claim":

> [W]here the right of action has been barred by a statute of limitations and a later act has attempted to repeal or remove the bar after it became complete, the rule sustained by reason and preponderant authority is that the removing act cannot be given effect consistently with constitutional provisions forbidding a deprivation of property without due process of law. "The reason is," as this Court has said, "that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law."

Id. at 417 (quoting *Campbell* v. *Holt*, 115 U.S. 620, 623 (1885)).[35]

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35. The principle in *Stewart* applied in the context of a suit "to recover real or personal property." 295 U.S. at 417. Nonetheless, the reasoning of *Stewart* extends to all situations in which a repealing act attempts to deprive "vested" property that had "become the defendant's" prior to the enactment of the legislation. *Id. See also Campbell*, 115 U.S. at 623, 628 (change in limitations period may not overturn "vested" right and limitations bar may be changed "until the bar is complete").

In response to this uniform and unbroken precedent, the lower courts have repeatedly condemned legislative efforts to overturn final judgments and have adhered to the rule of *McCullough*. *See Central States Pension Fund*, 960 F.2d at 1345; *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 810; *Daylo*, 501 F.2d at 816; *De Rodulfa*, 461 F.2d at 1252; *Adams*, 147 F.R.D. at 268; *I.A.M. Nat'l Pension Fund* v. *Wakefield Indus., Inc.*, 612 F. Supp. 643, 646 (D.D.C. 1985); *Board of Educ. of the City of Chicago*, 588 F. Supp. at 235; *Electronic Data Sys. Corp.*, 508 F. Supp. at 1363; *see also American Federation of Gov't Employees* v. *Reagan*, 870 F.2d 723, 726 n.20 (D.C. Cir. 1989); *Tonya K.*, 847 F.2d at 1247-48 ("once a court has disposed of a case, Congress may not dictate a different result"); *Taxpayers for Animas-La Plata Referendum* v. *Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1477 (10th Cir. 1984). Academic commentators are in agreement. *See* Palm, *The Constitutionality of Section 27A*, n. 12, *supra* at 1287 & n. 295-96; Note: *Section 27A of the SEA: An Unplugged* Lampf, n. 12, *supra* at 206-07 & n. 61-62.

B. Modern Due Process Jurisprudence Requires Reaffirmation of *McCullough* and the Vested Rights Principle.

Apart from the contention that *McCullough* is simply too old to be good law, the Fifth Circuit erroneously concluded that *McCullough* has been overruled *sub silentio* by the recent "jurisprudence that the Court has developed to describe how due process protects individuals from retroactive legislation." 997 F.2d at 47; Pet. App at A-16. In so holding, the Fifth Circuit rejected what it characterized as the "hackneyed" rule that "a law cannot be retroactively applied to impair vested rights" (*id.* (citation omitted)) — indeed, the court just declined to "waste

. . . further time'' with the ''confusing'' terminology of ''vested rights.'' 997 F.2d at 47; Pet. App. at A-17.[36]

This Court's decisions evince a consistent reliance on the concept of vested rights and a continuing effort to delineate between inchoate unvested rights and the vested rights to which Fifth Amendment protections attach. The ''concept of vested rights'' is the ''test for evaluating retrospective laws in a civil context.'' *Weaver* v. *Graham*, 450 U.S. 24, 31 n.13 (1981) (dictum). For example, in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 720 (1974), this Court noted that it ''has refused to apply an intervening change . . . where it has concluded that to do so would infringe upon or deprive a person of a right that has matured or become unconditional.'' *Id.* at 720 (citations omitted).

Accordingly, ''once rights are fixed by judgment, they are a form of property over which the legislature has no greater power than it has over any other form of property.'' *Johnston*, 1993 WL 500842 at *5 (citing *Axel Johnson*, 6 F.3d 83 (2d Cir. 1993)). *See Georgia Ass'n of Retarded Citizens*, 855 F.2d at 810. There is no question that ''[a] judgment that has become final through exhaustion of all appellate remedies is a property right.'' *Central States Pension Fund*, 960 F.2d at 1345.[37] This

36. In so concluding, the Fifth Circuit relied on a broad generality from what it termed a ''seminal'' treatise, N. Singer, 2 Sutherland Statutory Construction § 41.05, at 364-365 (C. Sands 4th ed. 1986). Less than thirty pages later, in this ''seminal'' treatise, the following sentences appear:

> Where their retroactivity does not otherwise render them invalid, laws may retroactively affect litigation *where the judgment has not become final*. Since legislative enactments may have the effect of rendering court judgments ineffective, *it is the direct legislative reversal of a court decision that is per se objectionable*.

Id. at § 41.08, at 395 (5th ed. 1993) (emphasis supplied).

37. Moreover, as Pacific Mutual concedes, the final judgment of the district court provided Petitioners with the tangible right to relief from exposure to Section 10(b) claims under the Securities Exchange Act of 1934 (which as a matter of law cannot be heard in state court).

is the clear import of this Court's precedent insofar as final judgments,[38] and other intangible property rights,[39] are concerned. Even the Fifth Circuit acknowledged that a final judgment itself is ''a species of property right,'' 997 F.2d at 51 n.14; Pet. App. at A-25 n.14, but held erroneously that a vested right could be divested if the legislature has a ''rational basis'' for doing so.

Such a rational relationship standard is simply inapplicable. The Constitution ''prohibits (or requires compensation for) all retroactive laws that destroy vested rights.'' *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 856 (1990) (Scalia, J. concurring) (citing *Hodel* v. *Irving*, 481 U.S. 704 (1987) and *United States Trust Co. of N.Y.* v. *New Jersey*, 431 U.S. 1 (1977)). In addition to the cases involving final judgments, this Court has rejected efforts to overturn retroactively vested rights in a panoply of factual situations not involving final judgments; in none of these decisions did this Court hint that such interfering actions would pass constitutional muster upon a showing of mere rationality. For example, in *Asiatic Petroleum Co.* v. *Insular Collector of Customs*, 297 U.S. 666, 671 (1939), this Court opined that a Philippines Independence Act ''cannot operate retroactively to deprive the petitioner of rights vested before its adoption.'' *See also United States* v. *Darusmont*, 449 U.S. 292, 299 (1981) (retroactive taxes are subject to stringent due process analysis if the tax involves gifts that were ''made and completely vested'' before the enactment of the taxing statute); *Coombes* v. *Getz*, 285 U.S. 434, 442 (1932) (vested

38. *Supra* at 29-33 (citing, *inter alia*, *McCullough*, 172 U.S. at 123; *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) at 431).

39. This Court has ruled that intangible types of property are fully protected by the Fifth Amendment. *See, e.g., Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1011-12 (1984); *United States* v. *Security Indus. Bank*, 459 U.S. 70, 77-78 (1982); *Lynch* v. *United States*, 292 U.S. 571, 579 (1934); J. Nowak & R. Rotunda, Constitutional Law 4th at § 11.12 (1991).

contract right may not be destroyed retroactively because it acquires "independent existence competent to survive the destruction of the provision which gave it birth"); *Ettor* v. *City of Tacoma*, 228 U.S. 148, 156 (1913) (invalidating legislation that "deprive[d] the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right").[40]

These decisions establish that a legislature may not divest an individual of rights once they become "vested" — at least not without just compensation. Nonetheless, it is true that whether rights have vested is not necessarily self-evident; the Court must still determine "what circumstances qualify a right to be characterized as 'vested.' " 997 F.2d at 47; Pet. App. at A-17 (citations omitted). However, under any "circumstances," the rights and liabilities fixed in the final judgment of an Article III represent a vested property right because:

> [A] judgment is the "perfected" claim. The speculation surrounding the legal relation of the litigants has been dispelled and their respective obligations have been established. A court has considered the merits of each party's claim and has rendered a judgment in favor of one of them. It is, therefore, consistent with the aims of property law that a final judgment be accorded more comprehensive protection than the underlying claim. The value and efficacy of the judicial process would be seriously impaired if the legislative and executive branches did not recognize and support the sanctity of a final judgment.

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40. *See also National Wildlife Federation* v. *Marsh*, 747 F.2d 616, 620 (11th Cir. 1984) ("A new law will not be applied if it adversely affects a party's vested rights."); *In re Reynolds*, 726 F.2d 1420, 1424 (9th Cir. 1984) ("[I]n matters involving property rights, retroactive application of a new statute might result in an unconstitutional taking of property without due process of law.").

Cooke, Dames & Moore v. Reagan — *Rights In Conflict: The Fifth Amendment Held Hostage*, 31 Amer. U. L. Rev. 345 (1982).

Certainly, a final judgment is even more firmly "vested" than the unadjudicated entitlements, described above, that this Court has previously deemed vested: a tariff (*Asiatic Petroleum*, 297 U.S. at 671); a contract (*Coombes*, 285 U.S. at 442); a rate of gift taxation (*Darusmont*, 449 U.S. at 299); liens (*Security Indus. Bank*, 459 U.S. at 77-78; *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960)); a bond covenant (*United States Trust Co.*, 431 U.S. at 31-32); a mortgage (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 580 (1935)); a right to a construction permit free of public easements, *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987), and the right to dispose of Indian lands at death (*Hodel*, 481 U.S. at 715-17). All of these were unadjudicated entitlements; none had previously been vested in the claimants by the judgment of an Article III court.

The Fifth Circuit did not mention any of these precedents. Instead, it concluded that this Court had "retreated" from *McCullough* in issuing decisions such as *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and similar cases that permit legislation to operate retroactively even if "settled expectations" regarding economic issues are overturned, such as the expectation of coal mine operators that they would be free of liability for black lung disease. But the coal mine operators in *Usery* had no final judgment vesting their right to be free of such liability. *Usery* and similar cases do not state, or even imply, that such a vested right would have been ignored, or subject to divestiture upon a showing of rational basis. Nor do they overrule, or even alter, *McCullough*, *Stewart* or any of the cases that accord constitutional protection to final judgments or other rights that are not merely expectations, but "vested" rights.

At most, *Usery* and similar cases permit the legislature to "restrict" the way vested property rights "are used, or to condition their continued retention on performance of certain

affirmative duties," *United States* v. *Locke*, 471 U.S. 84, 104 (1985), subject to a showing of mere rationality. But these cases do not permit the retroactive *elimination* of vested property rights, much less the vacation of final judgments, based on nothing more than a finding of "rational basis."

Usery does not alter the axiom that "[a]lthough the state possesses the power to regulate property without payment of compensation, if the regulation goes too far, a taking may be found." J. Nowak & R. Rotunda, Constitutional Law 427 (4th ed. 1991); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.). If legislation results in the "total destruction by the Government of all value," such an effect is not a "mere 'consequential incidence' of a valid regulatory measure." *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960) (legislation making it impossible for petitioners to enforce their materialmen's liens which had attached under state law effected a taking).[41] Thus, before the passage of Section 27A(b), defendants "admittedly had compensable property" — freedom from the possibility of a federal claim for millions of dollars. "Immediately afterwards, they had none." *Armstrong*, 364 U.S. at 48. Such a deprivation cannot be justified merely by showing that the Government nullification of a vested right might have a "rational" basis.[42]

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41 *See First Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 316-17 (1987); *United States* v. *Security Indus. Bank*, 459 U.S. 70, 77-78 (1982); *Louisville Joint Stock Land Bank*, 295 U.S. at 580 (legislation depriving mortgagees of substantial incidents of their rights against mortgaged property effected a taking).

42 The decisions cited by the Fifth Circuit that apply a rational basis standard are fully consistent with this principle; none involves the complete elimination of a vested property right. *See, e.g., United States* v. *Sperry Corp.*, 493 U.S. 52, 60-61 (1989) (permitting payment of monetary award to be contingent on payment by recipient of award of user fee to tribunal, but not suggesting that award could be entirely divested); *Pension Benefit Guar. Corp.* v. *R.A. Gray Co.*, 467 U.S. 717, 733-734 (1984) (act conditioned an employer's right to withdraw from a pension plan on a requirement that the employer compensate the plan for benefits that have already vested with

Thus, no court, other than the Fifth Circuit in this case, has ever extended the principle in *Usery* to upset the principle in *Mahon* and *Armstrong* and to authorize Congress to eliminate rights vested in a final judgment. Based on *Usery* and similar cases, the courts have retroactively applied statutory changes in *pending* cases, but have consistently recognized that retroactive legislation cannot undermine "definite or enforceable property rights . . . reduced to final judgment." *See, e.g., Georgia Ass'n. of Retarded Citizens*, 855 F.2d at 811 (citing *Usery* but holding that Congress' power to create "new legal rights . . . does not permit it to disturb a right that vests as the result of a judgment"); *Salmon* v. *Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991); *In re TMI Litig. Cases Consolidated II*, 940 F.2d 832, 861 (3d Cir. 1991) (citing *Usery* and *Arbour* v. *Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) and stating that a claim affords no property right "until reduced to final judgment"), *cert. denied*, 112 S. Ct. 1262 (1992); *Lunsford* v. *Price*, 885 F.2d 236, 240 n.13 (5th Cir. 1989); *Grimesy* v. *Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989) (rights do not vest until "a final unreviewable judgment"), *cert. denied*, 111 S. Ct. 1620 (1991); *Canisius College* v. *United States*, 799 F.2d 18, 25-26 (2d Cir. 1986) (citing *Usery* and *Forbes Pioneer Boat Line*, but stating that right not protected because plaintiff "has no final judgment establishing such a right"), *cert. denied*, 481 U.S. 1014 (1987); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.) (Congress can act so long as claims have "not ripened into final judgment"), *cert. denied*, 335 U.S. 887 (1948); *National Railroad Passenger Corp.* v. *State of Nev. Dept. of Conservation and Natural Resources*, 776 F. Supp. 528, 532 (D. Nev. 1991);

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employees at the time of the withdrawal); *Wright* v. *Union Central Life Ins. Co.*, 304 U.S. 502, 516 (1938) (legislation did not eliminate rights of purchaser at foreclosure sale; it "merely delayed" the exercise of these property rights).

Michael Reese Hosp. & Medical Center v. *United States*, 684 F. Supp. 986, 991 (N.D. Ill. 1988).

C. The Cases that Have Purportedly Overturned Final Judgments Are Inapposite.

In its briefs below, the Government cited several other decisions of this Court which, it claimed, establish that the final judgment involved here was not entitled to protection, constitutional or otherwise. Not a single one mentions, much less overrules, *McCullough*, *Stewart* and their progeny. Moreover, none of these cases involves a legislative attempt to reopen a final judgment of an Article III court in a closed case brought by a private litigant in which money damages were at stake.

Instead, each decision falls into one of several narrow exceptions to the otherwise absolute rule applying the protections of the Fifth Amendment to final judgments — none of which applies to this case and none of which undermines the general rule of absolute protection for final judgments. First, final judgments of injunctive relief that affect public rights are vulnerable to legislative reopening. *See, e.g., Fleming* v. *Rhodes*, 331 U.S. 100, 106-07 (1947); *Hodges*, 261 U.S. at 603; *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) at 429; *see* p. 42, *infra*. Second, administrative decisions of Article I courts may be legislatively altered. *See Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378-79 (1940); *Stephens*, 174 U.S. at 477. *See* p. 43-44, *infra*. Third, decisions rendered in times of war or national emergency are more vulnerable to legislative reopening. *See Fleming*, 331 U.S. at 106-07; *Freeland* v. *Williams*, 131 U.S. 405, 417-21 (1889). Fourth, Congress may waive the *res judicata* defense when a prior judgment was entered in the Government's favor on a claim against the Government. *See Sioux Nation*, 448 U.S. at 371. *See* p. 24, *supra*. Finally, void judgments and those obtained by fraud confer no vested rights. *See, e.g., Freeland*, 131 U.S. at 418-19; *Sampreyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 237- 39 (1833) (judgment obtained

by fraud in favor of a fictitious person). *See* p. 44, *infra*.[43]

These precedents represent "no broad departure from the constitutional command" that the Fifth Amendment prohibits, or requires compensation for, the taking of a final judgment. *Cf. Northern Pipeline*, 458 U.S. at 63 (Opinion of Brennan, J.) (discussing separation of powers). Accordingly, no court, other than the Fifth Circuit in this case, has ever applied these cases to overturn a final judgment of an Article III court in favor of a private litigant in a case involving money damages.[44]

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43. In its briefs in *Plaut*, the Government asserted that "curative legislation" could also fall outside of the broad prohibition against the legislative nullification of final judgments. However, even if that assertion is correct, it would not excuse the deprivation caused by Section 27A(b). Curative legislation corrects "defects in the administration of the law," such as a mistake in processing taxpayer refund claims or other "mistake[s] of officers purporting to administer the law in the name of the Government." *See Graham & Foster* v. *Goodcell*, 282 U.S. 409, 427, 429 (1931); *Van Emmerick* v. *Janklow*, 454 U.S. 1131, 1133 (1982) (White, J. dissenting from denial of certiorari) (curative legislation may remedy only "administrative, procedural, and technical defects unrelated to the underlying policy"). Section 27A(b) did not "cure" administrative mistakes, but purported to nullify the decision of this Court in *Lampf* and the final judgment of an Article III court in this case. A curative statute may not be applied in this manner, which "demolish[es] intervening vested rights." *American Fed. of Gov't Employees* v. *Reagan*, 870 F.2d 723, 726 n.20 (D.C. Cir. 1989) (citing *Forbes*, 258 U.S. at 338). *See also Hodges*, 261 U.S. at 603; *United States* v. *Heinszen*, 206 U.S. 370, 384 (1907) (curative legislation cannot interfere with "intervening rights").

44. The lower courts have recognized a number of limited exceptions to the inviolability of final judgments, but have also stated that those exceptions do not undermine the absolute protection accorded final judgments between private parties in a case involving money damages. *See Johnston*, 1993 WL 500842, at *8 n.10 (describing limited exceptions for judgments in favor of the government and those involving public rights); *Georgia Ass'n*, 855 F.2d at 811 (same); *Daylo*, 501 F.2d at 816 (final judgments may be upset only in "exceptional circumstances," including public rights); *De Rodulfa*, 461 F.2d at 1252 n.61 (public rights exception).

The Fifth Circuit heavily relied on *Fleming* v. *Rhodes*, 331 U.S. 100 (1947), where this Court sustained legislation that prevented landlords from enforcing state court judgments of eviction obtained against tenants. *Fleming* involved neither an action for money damages nor the judgment of an Article III court. More fundamentally, this Court has already determined that *Fleming* did not affect the rights vested in a final judgment but only permitted "Federal regulation of future action." *Federal Housing Admin.* v. *Darlington Mills*, 358 U.S. 84, 90 (1958); *id.* at 93 (Frankfurter, J., dissenting) (*Fleming* did not involve "the complete wiping out of . . . 'vested rights' "). *See also Johnston*, 1993 WL 500842, at *6 ("*Fleming* did not compel the courts to reopen final judgments; rather the legislation merely directed courts to enjoin future proceedings by the appellant"); *Battaglia*, 169 F.2d at 259 (*Fleming* applies to claims that "had not ripened into final judgment"); *Treiber* v. *Katz*, 796 F. Supp. 1054, 1061 n.6 (E.D. Mich. 1992); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 719 n.146 (1960) (the statute in *Fleming* was "construed as preventing only future evictions . . . [not as] depriving a person of a previously acquired judgment.").[45]

Fleming is distinguishable on several other grounds. The case involved the constitutionality of the Emergency Price Control Act, a wartime emergency measure, a context in which retroactive legislation is far more likely to withstand constitutional scrutiny.[46] Moreover, *Fleming* involved the assertion of

45. This interpretation of *Fleming* is confirmed by the *Fleming* Court's reliance (331 U.S. at 107 n.12) upon *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378-79 (1940), a case in which the Court specifically reaffirmed the decisions in *Forbes Pioneer Boat Line*, 258 U.S. at 338, and *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) at 431. *See Paramino Lumber*, 309 U.S. at 378 n.13, 379 n.15. *See* p. 43-44, infra.

46. The *Fleming* Court also relied upon *Bowles* v. *Willingham*, 321 U.S. 503 (1944), for the proposition that the act was of "unquestioned" constitutionality. *Fleming*, 331 U.S. at 106. But *Bowles* turned in part upon the fact

public rights by, and the grant of injunctive relief in favor of, the federal Price Control Administrator. Unlike the private rights vested in favor of defendants here, public rights may be "annulled by subsequent legislation." *Hodges* v. *Snyder*, 261 U.S. at 603; *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) at 431-32. Also, judicial decrees in equity, unlike other final judgments, are more "vulnerable" to legislative modification because of the prospective and thus "legislative" nature of injunctive relief. *Daylo*, 501 F.2d at 818.[47] *See also System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961) (modification of injunction permissible because "injunction directed to events to come is subject always to adaptation as events may shape the need"); *Johnston*, 1993 WL 500842, at *6; *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 812; *accord Northern Pipeline*, 458 U.S. at 69-70 (disputes involving "public rights," as opposed to those involving private rights, may be removed from Article III courts).

Although the government relied on *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940), below, that decision permitted the reopening of a compensation order from a non-Article III worker's compensation board only after noting that the "private act" in question "does not set aside a judgment,

that the act provided "all that due process *under the war emergency* requires." 321 U.S. at 521 (emphasis added). "[I]t is undeniable that emergency legislation is more likely to receive favorable treatment by the Court than are other retroactive statutes." Hochman, *Retroactive Legislation*, 73 Harv. L. Rev. at 700. *See also United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

47. "Since injunctive relief necessarily depends on a continuing affront to one's legal rights, while legal relief depends only on a judicial determination that one's legal rights have been violated with resulting cognizable damage to the claimant, Congress could permissibly change the law so as to deprive a party of its right to injunctive relief." *Plaut*, 1 F.3d at 1495.

create a new right of action or direct the entry of an award." 309 U.S. at 378.[48] Similarly inapposite is *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 477-78 (1899), in which the Court reopened a judgment of a territorial "legislative" court, *i.e.*, an Article I court, based on Congress' plenary power over Indian affairs. *See United States* v. *City of McAlester*, 604 F.2d 42, 47 (10th Cir. 1979). *Stephens* reaffirms the proposition that "it is undoubtedly true that legislatures cannot set aside the judgments of courts" and the Court specifically refused to "interfere in any way with the judicial department of the Government." 174 U.S. at 478.

Also inapposite is *Freeland* v. *Williams*, 131 U.S. 405 (1889), a decision cited in almost no subsequent opinions, which turned in large part on the purpose of "quieting strife and securing repose after the turmoils of a civil war."[49] And the decision overturned a void judgment "rendered on account of acts done in pursuance of the powers of a belligerent in time of war." *Id.* at 417. Moreover, *Freeland* "predated *McCullough* and, therefore, to the extent, if any, that *Freeland* conflicts with *McCullough's* pronouncements, *McCullough* controls." *Johnston*, 1993 WL 500842, at *6 n.7.[50]

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48. The *Paramino Lumber* court also reaffirmed the decisions in *Forbes Power Boat Line* and *Wheeling & Belmont Bridge*. *See* 309 U.S. at 378-79. It also suggested that, apart from due process, a legislative effort to overturn final judgments might contravene separation of powers principles. *See* 309 U.S. at 381 & n.25 (legislation "affecting judicial judgments rather than administrative orders" could be an "excursion of the Congress into the judicial function") (citing *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855)).

49. *Id.* at 419. Retroactive legislation in an emergency context is "far more likely" to withstand constitutional scrutiny. *See supra* at n. 46.

50. This Court has also cited *Freeland* at the same time that it has adhered to the rule that "legislatures cannot set aside the judgments of courts." *Stephens* v. *Cherokee Nation*, 174 U.S. at 478.

D. Judgments Based on Limitations Grounds Are Entitled to Due Process Protection.

The Fifth Circuit's principal response to the foregoing contentions was that Congress acted "rationally" when it deprived defendants of a final judgment because that decree was based upon a statute of limitations defense. In so holding, the Fifth Circuit cited excerpts from *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945), which the court interpreted as suggesting that the "shelter" of the statute of limitations was not a "fundamental" right. 997 F.2d at 49-50; Pet. App. at A-22.

In *Chase*, this Court permitted the plaintiff to take advantage of a retroactive change in a limitations period when the case was still *pending* — the situation in *The Schooner Peggy*, but not in the case at bar. Indeed, in two separate portions of the *Chase* opinion, this Court made it abundantly clear that the case was "not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor," 325 U.S. at 310, *id.* at 316, and that plaintiff had no constitutional right "before final adjudication."[51] It is hard to imagine two plainer signals that a different result in *Chase* would have been reached if the defendant had obtained a final judgment before the statute had been enacted.

Recognizing this obvious inference from *Chase*, the Fifth Circuit advanced a remarkable theory: as *Chase* "predates

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51. *See also Johnston*, 1993 WL 500842 at *6 (*Chase* did not involve a final judgment); *Plaut*, 1 F.3d at 1496 ("Congress may change an established time bar. . . . But where the courts have *adjudged* a claim to be time-barred, Congress cannot compel the courts to reopen a settled judgment.") (discussing *Chase*). "Even though Defendants do not have vested rights in a particular statute of limitations, Defendants *do* have vested rights in this Court's judgment dismissing Plaintiff's Section 10(b) claims." *Treiber* v. *Katz*, 796 F. Supp. 1054, 1061 (E.D. Mich. 1992) (emphasis in original).

both *Fleming* and *Usery*," which the Fifth Circuit characterized as holding that final judgments may be upset "under some circumstances," the "final adjudication" caveats in *Chase* no longer need be heeded. 997 F.2d at 50; Pet. App. at A-23. This contention, which borrows parts of holdings from three inapposite cases and cobbles them into a conclusion which would overrule, *sub silentio*, a century of precedents, does not merit serious consideration.

It bears mention that, since *Chase*, the courts have reaffirmed that statutes of limitations "are an integral part of the legal system and are relied upon to protect the liabilities of persons and corporations active in the commercial sphere." *Bendix Autolite Corp.* v. *Midwesco Enterprises*, 486 U.S. 888, 893 (1988). "Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Board of Regents of the Univ. of the State of N.Y.* v. *Tomanio*, 446 U.S. 478, 487 (1980). *See also United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (limitations periods convey "the right to be free of stale claims"); *Shoup* v. *Bell & Howell Co.*, 872 F.2d 1178, 1181 (4th Cir. 1989) ("statutes of limitations . . . are no less important than other rules of decision"); *PRC Harris, Inc.* v. *Boeing Co.*, 700 F.2d 894, 896 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983). Principles of finality are "not a mere matter of practice or procedure" and are instead "a rule of fundamental and substantial justice." *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981). And, "[a] decision by a federal court adjudging a claim to be time barred is a final judgment on the merits, and, once a claim is so adjudged, Congress cannot direct the court to reopen the judgment. . . ." *Johnston*, 1993 WL 500842, at *7; *see also* Fed. R. Civ. P. 41(b) (limitations dismissal is adjudication on the merits).

However one characterizes statute of limitations protections, the fact remains that petitioners have been deprived of a judgment — not just an unmatured or inchoate right to relief.

And it is settled that the right to be free of liability is entitled to the same constitutional protection as the right to awards of monetary damages or tangible property, including judgments of dismissal and other forms of non-monetary relief.[52] "Like an award of damages or an award of costs, the right to receive — and conversely, the *right not to pay* — attorney's fees is, in the parlance of these cases, a private right not subject to divestiture by retroactive legislation." *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 812 (emphasis supplied). This result is supported by the principle that "[a] final judgment entered by a court of general jurisdiction normally establishes not only the measure of the plaintiff's rights but also the limits of the defendant's liability." *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 282 (1980) (opinion of Stevens, J.); *see also Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (due process clause protects "civil litigants who seek recourse in the courts . . . as defendants hoping to protect their property").

Additionally, the Government and Pacific Mutual's contention that the final judgment in this case was an "unfair windfall" (*see, e.g., Johnston*, 1993 WL 500842, at *4) is unavailing and inaccurate. Far from constituting a "windfall", *i.e.*, an unintended consequence of an act effected for other purposes, the result in the District Court was specifically intended

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52 *See Benoni*, 828 F.2d at 54, 57 (discussing constitutional restrictions on private bill intended to resurrect dismissed claims); *see also American Fed. of Government Employees*, 870 F.2d at 726 n.20 (controversy involving executive order on unionization was not moot because subsequent order could not eliminate vested rights in prior order; no discussion of monetary damages); *Board of Educ.*, 588 F. Supp. at 235 (discussing constitutional limitations on subsequent legislation undermining desegregation consent decree, with no discussion of monetary damages); *Cerro Metal Prods.*, 467 F. Supp. at 877 (refusing to give retrospective effect to Secretary of Labor's revision of regulation on search warrants based on separation of powers concerns; no monetary damages involved).

by the Court and mandated by its decisions in *Lampf* and *Beam*. Moreover, the "ad hoc determination[s] of the equities in a particular case" must yield to the principle of finality. *Federated Department Stores*, 452 U.S. at 401 (quoting *Heiser* v. *Woodruff*, 327, U.S. 726, 733 (1946)). *See Beam*, 111 S. Ct. at 2447 (Opinion of Souter, J.); *see also Harper*, 113 S. Ct. at 2517 (case law changes applied retroactively to "cases still open on direct review"). "Congress may not retrospectively vacate decided cases, regardless of how compelling the perceived injustice visited upon the parties by a valid exercise of the judicial power." *Johnston*, 1993 WL 500842, at *7 (quoting *Plaut*, 1 F.3d at 1498-99).

E. Rule 60(b)(6) Does Not Undermine the Inviolability of the Final Judgment.

The Fifth Circuit's reliance on Fed. R. Civ. P. 60(b)(6) to justify a *legislative* attempt to reopen a final judgment (997 F. 2d at 49; Pet. App. at A-20) is also mistaken. Again, apart from the decision below, no court has ever decided that Rule 60(b) could provide a basis for undermining the constitutional protection accorded vested rights.[53] As the court in *Johnston* held:

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53 The Fifth Circuit also erred in holding that a change in law warrants R. 60(b)(6) relief. 977 F.2d at 49; Pet. App. at A-21. In fact, the courts have generally ruled that a court's mistake in the law and/or a mere change of law are not sufficient grounds for reopening a final judgment for money damages under R. 60(b)(6). *Ackermann* v. *United States*, 340 U.S. 193, 197-99 (1950) (denying R. 60(b)(6) relief, despite intervening decision in a related case, the record in which contained "all the evidence" pertinent to petitioner's case); *Van Skiver* v. *United States*, 952 F.2d 1241, 1245 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 89 (1992); *Ritter* v. *Smith*, 811 F.2d 1398, 1401 (11th Cir.) ("something more than a 'mere' change in the law is necessary to provide the grounds for R. 60(b)(6) relief."), *cert. denied*, 483 U.S. 1010 (1987); *Travelers Indem. Co.* v. *Sarkisian*, 794 F.2d 754, 757 (2d Cir.) ("change in decisional law is not grounds for relief"), *cert. denied*, 479 U.S. 885 (1986). Moreover, virtually all of the courts that have reopened final judgments following a change in law under R. 60 have done so to modify an injunction, not a judgment in a case seeking money damages.

> The power of the courts to reopen final judgments under Rule 60(b) is narrow and subscribed . . . under Rule 60(b), final judgments are subject to a case-by-case evaluation by a tenured judge who is free from political pressure. The Rule 60(b) guidelines are far different from the rational basis review the government would advance for legislative action to deprive a private litigant of his or her final judgment.[54]

No decision of this Court remotely supports the view that the standards in Rule 60(b) allow the wholesale obliteration of vested substantive property rights by a legislative body, subject as it is to the constant blandishments and temptations of its various constituents. In the context of separation of powers principles, as well as vested rights, such a license would mean that there are no final judgments and thus "there are no 'rights' of any kind and every decision . . . is forever malleable." *Tonya K*, 847 F.2d at 1248.

Richardson v. *Bowen*, 807 F.2d 444, 446 n.3 (5th Cir. 1987) (analyzing numerous cases). *See also Marshall* v. *Board of Ed.*, 575 F.2d 417, 425 (3d Cir. 1978).

54 *See* Note: *Section 27A of the SEA: An Unplugged* Lampf *Sheds No Constitutional Light*, 78 Minn. L. Rev. 197, 226 (1993) (Rule 60(b) "is designed to provide litigants with an opportunity to revisit a judgment when a *court independently* determines in its equitable judgment that the facts of any particular case, including statutory changes, warrant reinstatement. Mandatory reinstatement through laws which reflect a legislative determination that an injustice occurred within the judiciary undermines the structural considerations implicit in Rule 60(b) by granting the legislature an impermissible power of ultimate judicial review.") (emphasis in original).

CONCLUSION

For all the foregoing reasons, petitioners respectfully submit that the judgment of the Fifth Circuit should be reversed.

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APPENDIX A

U.S. Const., Art. III reads, in pertinent part, as follows:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times receive for their Services a Compensation which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

The Fifth Amendment to the U.S. Constitution reads in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.